Bond and Discovery

CHAPTER 5

5.1 Chapter Overview

This chapter presents information on statutory provisions and case management practices that allow a court, before trial, to enhance the safety of a sexual assault victim (and the public), while also protecting a defendant's rights. Accordingly, the majority of this chapter focuses on bond and pretrial release orders. The remainder of the chapter presents information on pretrial discovery, and explores the boundaries between a defendant's right to obtain exculpatory evidence and a victim's right to safety and privacy.

Note: The discussion in this chapter assumes that the defendant is an adult. For a discussion of pretrial release of juvenile offenders, see

Miller, *Juvenile Justice Benchbook* (MJI, 1998), Sections 7.15-7.17. A discussion of crime victim safety generally appears in Miller, *Crime Victim Rights Manual* (MJI, 2001).

5.2 Interim Bond

*See Section 5.2(B) for information regarding interim bond exceptions.

The following section discusses interim bond and its applicability to sex offenders charged with misdemeanor and felony sex offenses. No specific restrictions prohibit interim bond for sex offenders (unless the sex offender is also charged with a misdemeanor domestic assault and battery offense).* However, the absence of specific restrictions does not mean that interim bond is required for sex offenses or that sex offenders carry less risk of re-offense or re-assault than do perpetrators of other types of crimes.

A. Applicable Law

The interim bond statutes found at MCL 780.581 to MCL 780.587 apply generally to defendants arrested (with or without a warrant) for *misdemeanor* or *ordinance* violations punishable by imprisonment for not more than one year and/or a fine. MCL 780.581(1). These statutes contain no specific restrictions for sex offenses. Thus, if a magistrate is not available or immediate trial cannot be had, a defendant charged with a sex offense under a misdemeanor or ordinance that complies with the foregoing punishment restrictions may be released upon payment of an interim bond to the arresting officer or to the deputy in charge of the county jail. The amount of the bond shall neither exceed the maximum possible fine nor be less than 20% of the minimum possible fine for the offense for which the defendant was arrested. See MCL 780.581(1)-(2); and MCL 750.582.

For *felony* cases in which a warrant has been issued, interim bond is permitted by court rule. MCR 6.102(D). This rule, which also contains no specific restrictions for sex offenses, allows the court to specify on the warrant the amount of bond required for a defendant's release before arraignment and an expiration date beyond which the defendant may not be released. If bond has been specified on the warrant, a defendant must, under MCR 6.102(F), either be "arraigned promptly" or released on interim bail. The following conditions in MCR 6.102(F)(1)-(4) must exist before the defendant posts bail and submits a recognizance to appear at a specified court at a specified time:

> "(1) The accused is arrested prior to the expiration date, if any, of the bail provision;
>
> "(2) The accused is arrested in the county in which the warrant was issued, or in which the accused resides or is employed, and the accused is not wanted on another charge;
>
> "(3) The accused is not under the influence of liquor or controlled substance; and

"(4) The condition of the accused or the circumstances at the time of arrest do not otherwise suggest a need for judicial review of the original specification."

B. Exception If Misdemeanor Domestic Assault and Battery Also Charged

If a person is arrested with or without a warrant for a sex offense *and* a misdemeanor domestic assault and battery offense, interim bond will be restricted as required in MCL 780.582a.* Under MCL 780.582a(1), such a person must be held until arraignment or until interim bond can be set by a judge or magistrate. If the judge or magistrate sets interim bond, he or she "shall consider and may impose" a no-contact provision with the victim. MCL 780.582a(2). Other protective conditions may be imposed under MCL 780.582a(3) and MCL 780.582a(7). The protective conditions must be entered into LEIN, subjecting the person to warrantless arrest. MCL 780.582a(5).

*This statute was amended by 2001 PA 198, effective April 1, 2002.

The foregoing arrested persons who are ineligible for interim bond under MCL 780.582a are also ineligible for release on their own recognizance under MCL 780.583a.*

*Interim bond is also restricted for persons arrested without a warrant for alleged violation of a PPO. See MCL 764.15b(2)(b) and Lovik, *Domestic Violence: A Guide to Civil & Criminal Proceedings* (MJI, 2d ed, 2001), Section 8.6(C).

Note: The interim bond statutes and their exceptions apply only to misdemeanors or ordinances punishable by imprisonment for not more than one year and/or a fine. MCL 780.581(1). Thus, the two-year felonies of domestic assault and battery (3rd offense), MCL 750.81(4), and domestic aggravated assault and battery (3rd offense), MCL 750.81a(3), fall outside these statutory provisions. Interim bond for such felony offenses may be granted under MCR 6.102(D). The Advisory Committee to this Benchbook recommends that a court not grant interim bond in cases involving felony domestic assault and battery, as the argument for excepting misdemeanor domestic assault and battery offenses from interim bond applies with even greater force to felony domestic assault and battery offenses. In the event a court grants interim bond under MCR 6.102, the Advisory Committee recommends that the court consider writing protective conditions on the warrant under MCR 6.102(D), in addition to writing the bond amount and expiration date, as allowed under MCR 6.102(D). (This last recommendation is now a requirement when granting interim bond in misdemeanor cases, per MCL 780.582a(2), amended by 2001 PA 198, effective April 1, 2002: "[T]he judge or magistrate shall consider and may impose the condition that the person released shall not have or attempt to have contact of any kind with the victim.")

5.3 Denying Bond

Before conviction, a defendant's right to bail is secured by the Michigan Constitution.* Const 1963, art 1, §15. Under this constitutional provision, a court may deny bond to defendants charged with certain serious crimes, "when the proof is evident or the presumption great. Because some sexual assault crimes may involve the type of serious conduct for which bail may be denied, this section discusses the circumstances under which a court may deny bond.

*For a defendant's post-conviction right to bail, see Section 9.2.

A court may deny pretrial release to a defendant charged with murder if it finds that proof of guilt is evident or the presumption great. See MCR 6.106(B)(1)(a)(i) (this rule incorporates Michigan's constitutional bail provisions in Const 1963, art 1, §15).

A court may also deny pretrial release to a defendant charged with a violent felony* if it finds that proof of guilt is evident or the presumption great, and:

> "[A] at the time of the commission of the violent felony, the defendant was on probation, parole, or released pending trial for another violent felony, or
>
> "[B] during the 15 years preceding the commission of the violent felony, the defendant had been convicted of 2 or more violent felonies under the laws of this state or substantially similar laws of the United States or another state arising out of separate incidents." MCR 6.106(B)(1)(a)(ii).

*A "violent felony" is a felony that contains an element involving "a violent act or threat of a violent act against any other person." MCR 6.106(B)(2).

For a defendant charged with any of the following listed offenses, a court may deny pretrial release under MCR 6.106(B)(1)(b) if it finds that proof of guilt is evident or the presumption great, unless it also finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person:

- First-degree criminal sexual conduct;
- Armed robbery; or,
- Kidnapping with the intent to extort money or other valuable thing thereby.

No hearing is required to deny bond under MCR 6.106(B), unless the defendant is held in custody and requests a hearing. MCR 6.106(G)(1). If a hearing is held, MCR 6.106(G)(2) requires the following procedural safeguards:

- The defendant is entitled to be present and to be represented by a lawyer;
- The defendant and prosecutor are entitled to present witnesses and evidence, to proffer information, and to cross-examine each other's witnesses;
- The rules of evidence are not applicable, except those pertaining to privilege; and,
- A verbatim record of the hearing must be made.

If a court denies pretrial release, it must state its reasons on the record and on SCAO Form MC 240, which must be placed in the court file. MCR 6.106(B)(4).

Upon denial of pretrial release, a defendant may be held in custody for a maximum of 90 days after the date of the court's order, excluding delays

attributable to the defense. If trial does not begin within the 90-day period, the court must immediately schedule a hearing and set the amount of bail. MCR 6.106(B)(3).

5.4 Procedures for Issuing Conditional Release Orders

A court can issue an order for conditional pretrial release under MCL 765.6b, using SCAO Form MC 240. MCL 765.6b permits the court to impose such conditions as are "reasonably necessary for the protection of 1 or more named persons." Release orders issued under this statute can be expeditiously enforced. They are entered into the LEIN system, and law enforcement officers have statutory authority to make a warrantless arrest upon reasonable cause to believe that a violation has occurred.* The following discussion outlines the issuance procedures set forth in the statute, and in MCR 6.106(D), which operates in conjunction with the statute pursuant to MCL 765.6b(6).

*Warrantless arrest authority is based on MCL 764.15e and MCL 764.15(1)(g), which was amended by 2001 PA 212, taking effect April 1, 2002.

A. Time to Impose Conditions

Bond conditions may be imposed at any time during the pendency of the criminal case. See MCR 6.106(A), (H)(2). The court may apply conditions to all types of bonds, including cash bonds and personal recognizance bonds. MCR 6.106(C)-(E).

B. Appointing Counsel for Defendant

Because long pretrial delays leave witnesses and others involved with the case vulnerable to coercion and re-victimization, expedited docketing and case processing can enhance safety in sexual assault cases. To expedite proceedings, some courts appoint counsel at a defendant's first appearance in court, regardless of the defendant's stated intention of retaining an attorney. This practice not only safeguards a defendant's right to counsel, but can also prevent unnecessary delays if the defendant fails to make timely efforts to retain counsel. Defendants who eventually retain counsel at their own expense can then later, in the court's discretion, substitute counsel.*

*See *People v Mack*, 190 Mich App 7, 14 (1991), for discussion on a court's discretion in ordering substitution of counsel.

1. Scope of Right to Appointed Counsel

The Michigan Court Rules require courts to advise defendants of the right to counsel, and to appoint counsel for indigent defendants. In misdemeanor cases, an indigent defendant has a right to appointed counsel under MCR 6.610(D)(2) only when either of the following apply:*

- The charged offense requires on conviction a minimum term of jail; or
- The court determines that it might sentence the defendant to jail.

In felony cases, after it determines that a defendant is indigent, the court must "promptly appoint" a lawyer and "promptly notify" the lawyer. MCR

*The defendant must be informed of the right to appointed counsel at arraignment, MCR 6.610(D), and before accepting a guilty or no contest plea. MCR 6.610(E)(2)(a)-(b).

6.005(D). A court's determination of indigency in felony cases is governed by MCR 6.005(B). No such indigency rule exists for misdemeanors. For discussion of a defendant's right to appointed counsel for probation violations, and the effects of uncounseled convictions on that right, see Monograph 7: *Probation Revocation—Revised Edition* (MJI, 2002), Sections 7.12 and 7.36.

A defendant's right to proceed in propria persona is discussed in *People v Adkins (After Remand)*, 452 Mich 702, 720-727 (1996).

2. Defendant's Financial Contribution or Reimbursement

A court's authority to order a defendant to *contribute* to appointed counsel fees before termination of court proceedings, or to *reimburse* for those fees after termination of court proceedings, is governed by court rule and case law. MCR 6.005(C) permits a court to require contribution before termination of court proceedings if the defendant is partially indigent, i.e., if the defendant is able to pay part of the cost of the attorney.

*See also Number 3 on SCAO Form DC 213, Advice of Rights, which informs a defendant that "You may have to repay the expense of a court appointed attorney."

The following Michigan appellate cases establish the boundaries of a court's authority to order reimbursement for appointed counsel fees after termination of court proceedings.* In *Davis v Oakland Circuit Judge*, 383 Mich 717, 720 (1970), the Michigan Supreme Court held that a trial judge has "selectively discretionary authority" to order reimbursement and apply the "known assets" of an alleged indigent defendant (who failed to report assets) toward defraying in "some part" the cost of appointed counsel. In *People v Nowicki*, 213 Mich App 383, 386-388 (1995), the Court of Appeals held that the trial court had authority to order reimbursement for the costs of appointed counsel not from defendant's felony conviction and sentence but from his "obligation to defray the public cost of representation." In that case, the order was not part of the sentence, counsel was appointed irrespective of the defendant's ability to reimburse, and no claim was made that defendant was not financially able to make the reimbursement. Finally, in *People v Washburn*, 66 Mich App 622, 624 (1976), the Court of Appeals held that an order for repayment of the cost of appointed counsel should not be made before conviction.

> **Note:** A more detailed discussion of the rules governing appointed counsel for indigent defendants is found in Monograph 3: *Misdemeanor Arraignments and Pleas* (MJI, 1992), Section 3.18. For discussion of a defendant's obligation to pay the costs of appointed counsel after acquittal, see Newman, Schulte, and McCann, *Reimbursement or Contribution: An Indigent's Assumption of Counsel Costs*, 24 Criminal Defense Newsletter 1 (State Appellate Defender Office, March/April, 2001), and the three unpublished opinions of the Court of Appeals panel members in *People v Chandler*, unpublished opinion per curiam of the Court of Appeals, decided September 8, 2000 (Docket No. 206890) (vacating a trial court's order requiring an acquitted defendant to reimburse for assigned counsel fees), available at http://www.courtofappeals.mijud.net (last visited July 25, 2002).

C. Required Findings by Judge or District Court Magistrate

In cases involving allegations of sexual assault, it is safest to issue pretrial release orders under MCL 765.6b. This statute expedites enforcement of release orders by authorizing their entry into the LEIN system, giving law enforcement officers the authority to make a warrantless arrest upon reasonable cause to believe that a release order has been violated. See MCL 764.15e and MCL 764.15(1)(g).

MCL 765.6b(1) requires the judge or district court magistrate to make a finding of the need for protective conditions. This provision further states that the court must inform the defendant *on the record*, either orally or by a writing personally delivered to the defendant, of the following:

- The specific conditions imposed; and,
- That upon violation of a release condition, he or she "will be subject to arrest without a warrant and may have his or her bail forfeited or revoked and new conditions of release imposed, in addition to any other penalties that may be imposed if the defendant is found in contempt of court."

If the court orders the defendant released on conditions that include money bail, the court must state the reasons for its decision on the record. However, the court need not make a finding on each of the factors enumerated in the court rule. MCR 6.106(F)(2).* The court must make findings on the record in accordance with MCL 765.6(1), which provides:

*The court rule factors are discussed at Section 5.5.

> "Except as otherwise provided by law, a person accused of a criminal offense is entitled to bail. The amount of bail shall not be excessive and shall be uniform whether the bail bond is executed by the person for whom bail has been set or by a surety. The court in fixing the amount of the bail shall consider and make findings on the record as to each of the following:
>
> "(a) The seriousness of the offense charged.
>
> "(b) The protection of the public.
>
> "(c) The previous criminal record and the dangerousness of the person accused.
>
> "(d) The probability or improbability of the person accused appearing at the trial of the cause."

Using standard bond forms is encouraged. They provide defendants with written notice of all bond conditions. SCAO Form MC 240 is designed for orders issued under MCL 765.6b.

5.5 Factors to Consider in Determining Bond Conditions

MCL 765.6b does not specify factors for the court to consider in determining what conditions are "reasonably necessary" to protect a person from further assault by the defendant. However, MCR 6.106(D) states that the court may

impose conditions on pretrial release to "ensure the appearance of the defendant," or to "reasonably ensure the safety of the public." Additionally, MCR 6.106(F)(1) provides that the court should consider "relevant information" in making its release decision. "Relevant information" under MCR 6.106(F)(1) includes:

*A defendant's prior criminal record is not limited to convictions, and may include deferred matters and other information.

> "(a) defendant's prior criminal record, including juvenile offenses;*
>
> "(b) defendant's record of appearance or nonappearance at court proceedings or flight to avoid prosecution;
>
> "(c) defendant's history of substance abuse or addiction;
>
> "(d) defendant's mental condition, including character and reputation for dangerousness;
>
> "(e) the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence;
>
> "(f) defendant's employment status and history and financial history insofar as these factors relate to the ability to post money bail;
>
> "(g) the availability of responsible members of the community who would vouch for or monitor the defendant;
>
> "(h) facts indicating the defendant's ties to the community, including family ties and relationships, and length of residence, and
>
> "(i) *any other facts bearing on the risk of nonappearance or danger to the public*." [Emphasis added.]

In cases involving acquaintance (or non-stranger) sexual assault, the Michigan Sexual Assault Systems Response Task Force in *The Response to Sexual Assault: Removing Barriers to Services and Justice* (April 2001), p 58, § D, recommends that:

> "Judges and magistrates communicate that they regard sexual assault by non-strangers as seriously as sexual assault by strangers."

5.6 Contents of Conditional Release Orders

The court has broad authority to impose conditions of release under MCL 765.6b and MCR 6.106. The Michigan Sexual Assault Systems Response Task Force, in its report, *The Response to Sexual Assault: Removing Barriers to Services and Justice* (April 2001), p 59, § G, recommends as a best practice that:

> "Judges and magistrates issue pretrial release orders with ["no-contact"] or other provisions to protect the victim (as authorized by MCL 765.6b). Violations of such orders are subject to swift, appropriate sanctions. Tethering can be used in appropriate cases to promote victim and witness safety."

The following discussion summarizes the statutory and court rule provisions governing the contents of conditional release orders, and addresses practical concerns with such orders in cases involving allegations of sexual assault.

Under MCL 765.6b(2), the court's order (or amended order) for conditional release issued must contain:

- Defendant's full name;
- Defendant's height, weight, race, sex, birth date, hair color, eye color, and any other appropriate identifying information;
- A statement of the effective date of the conditions;
- A statement of the order's expiration date; and,
- A statement of the conditions imposed.

In conjunction with MCL 765.6b, MCR 6.106(D) further gives the court broad authority to impose any conditions or combination of conditions it determines are necessary to "reasonably ensure the appearance of the defendant as required, or . . . the safety of the public." Under MCR 6.106(D)(1), conditional release orders must provide that "the defendant will appear as required, will not leave the state without permission of the court,* and will not commit any crime while released." Additionally, the court rule contains a lengthy, non-exclusive list of other specific conditions that the court may impose. Under MCR 6.106(D)(2), the court may require the defendant to:

*Conditional release orders issued under MCL 765.6b are entitled to full faith and credit in other U.S. jurisdictions. 18 USC 2265-2266.

> "(a) make reports to a court agency as are specified by the court or the agency;
>
> "(b) not use alcohol or illicitly use any controlled substance;
>
> "(c) participate in a substance abuse testing or monitoring program;
>
> "(d) participate in a specified treatment program for any physical or mental condition, including substance abuse;
>
> "(e) comply with restrictions on personal associations, place of residence, place of employment, or travel;
>
> "(f) surrender driver's license or passport;
>
> "(g) comply with a specified curfew;
>
> "(h) continue to seek employment;
>
> "(i) continue or begin an educational program;
>
> "(j) remain in the custody of a responsible member of the community who agrees to monitor the defendant and report any violation of any release condition to the court;
>
> "(k) not possess a firearm or other dangerous weapon;

> "(*l*) not enter specified premises or areas and not assault, beat, molest or wound a named person or persons;
>
> "(m) satisfy any injunctive order made a condition of release; or
>
> "(n) comply with any other condition, including the requirement of money bail . . . reasonably necessary to ensure the defendant's appearance as required and the safety of the public."

The court may also impose a prohibition on the defendant's purchase or possession of a firearm under MCL 765.6b(3).* If the court imposes such a restriction, and the defendant is known to possess firearms, the court can enhance the safe enforcement of its order by giving specific instructions for their removal. Such instructions might authorize the police to remove weapons from the defendant's home before release, or specify a time and place for the defendant to turn them in.

*For more discussion of firearms disabilities, see Lovik, *Domestic Violence: A Guide to Civil & Criminal Proceedings* (MJI, 2d ed, 2001), Sections 9.7-9.8.

Additionally, the court may order electronic monitoring, i.e., "tethering," as a condition of bond. There are two types of tethering systems: (1) Radio Frequency, known as "traditional" tethering, which creates a distance limitation for the defendant from a fixed geographical location (typically the defendant's residence); and (2) Global Positioning System (GPS) tethering, which is a satellite surveillance system that creates off-limits geographical territories called "hot zones." It is important to note that tethering does have its limitations. Regarding "traditional" tethering, a defendant's whereabouts cannot always be assured; for instance, if the defendant is granted work- or school-release, the tether will typically be deactivated during those periods of release—thus increasing the potential danger to the victim. Regarding GPS tethering, although it is designed to precisely pinpoint the defendant's whereabouts 24-hours per day/seven days a week, regardless of being arrested or granted work- or school-release, a study published by the Michigan Domestic Violence Prevention and Treatment Board, *GPS Tethering Project Final Report* (November 25, 2000), found that GPS tethering still has limitations, some of which are as follows:

- Defendants may attempt to harass, annoy, and terrorize victims by simply approaching too closely to a geographical "hot zone," even though it may not be an actual violation of the "hot zone" itself. Such conduct activates a pager carried by the victim, which can cause a victim to experience, among other emotions, extreme fear and anxiety.
- Defendants repeatedly commit "hot zone" violations when they live in close proximity to the victims.
- GPS tethering does not always operate well near particular environments, such as airports or heavily wooded areas.
- Supervision of GPS tether defendants is labor intensive, and the staff must work closely with the community's victim service providers, the court, probation officers, and the GPS vendor to monitor compliance and potential "hot zone" violations.

Regardless of the type of tethering used by a court, it is important to emphasize that any alleged tether violation should, like other conditional release violations, be accompanied by a prompt judicial response and, if the tether violation is proved, appropriate consequences for the defendant.

A defendant who is committed to county jail pending trial may be eligible for release during "necessary and reasonable hours" for work, school, or medical, psychological, and substance abuse treatment. MCL 801.251. For information regarding this statute and its eligibility requirements, see Section 9.5(F).

5.7 LEIN Entry of Conditional Release Orders

Upon issuance of a release order (or a modified release order)* under MCL 765.6b, the judge or district court magistrate must immediately direct a law enforcement agency within the court's jurisdiction to enter the order into the LEIN system. This notice to the law enforcement agency must be in writing. MCL 765.6b(4). SCAO Form MC 240 can be used for this purpose.

*See Section 5.10 on modifying conditional release orders.

> **Note:** Although not required under MCL 765.6b, some courts give a certified copy of pretrial release orders to the protected individuals. This practice does not fulfill the court's statutory responsibility to have release orders with protective conditions entered into LEIN, but it does inform protected individuals of the specific release conditions, and it allows them to show the order to police officers in the event of a violation. However, while it may enhance safety, this practice carries a potential risk for confusion if the order is later amended or rescinded.

5.8 Duration of Conditional Release Orders

Under MCL 765.6b(2) the court's conditional release order (or amended order) must contain a statement of the order's expiration date. The duration of the conditional release order is within the court's discretion, and court practices differ in this regard. For example, some courts issue orders of six months' duration in misdemeanor cases, and one year's duration in felony cases. Other courts specify a one-year duration for release orders in all cases. In any event, the order should at least be of sufficient duration to cover the time needed to complete proceedings in the issuing court. In felony cases, six months is usually sufficient time to complete preliminary examination and bind-over proceedings in district court. In specifying an expiration date, it is important to note that release conditions expire at 12:01 a.m. on the date specified in the order.*

*SCAO Form MC 240a can be used to extend the expiration date of a bond.

Unless it is modified, rescinded, or expired, the district court's conditional release order in a felony case continues in effect after the defendant has been bound over to circuit court. See MCL 780.66(3). To expedite enforcement, however, circuit courts can take steps to update the information in the LEIN system after bindover, so that law enforcement agencies will have no questions about the status of the case in the event that the defendant violates

a release condition. The circuit court can continue or modify the district court's release order at arraignment, making it an order of the circuit court. If the only amendment the circuit court wishes to make is to extend the bond's expiration date, the court can complete SCAO Form MC 240a. If the conditions of bond release are to be amended in addition to, or instead of, the expiration date, the court should use SCAO Form MC 240. In any event, the court should contact the responsible law enforcement agency to enter the order into the LEIN system. After the circuit court's release order is entered into LEIN, SCAO Form MC 239 can be used to remove the district court's order from the system.

In addition to a conditional release order, a victim may inquire about seeking a personal protection order (PPO). In such circumstances, a judge or district court magistrate should refer the victim to the prosecutor's office or to the PPO office, if one has been created in that particular county. The circuit court judge assigned to the PPO request should, if the PPO is issued, make certain that the PPO conditions do not conflict with the conditions in the conditional release order, both of which will be entered into LEIN.*

*For more information on PPOs, see Lovik, *Domestic Violence: A Guide to Civil & Criminal Proceedings* (MJI, 2d ed, 2001), Chapter 6.

If an order issued under MCL 765.6b ceases because of rescission or closure of the case, the judge or district court magistrate shall immediately order the law enforcement agency to remove the ineffective order from the LEIN system. MCL 765.6b(4). SCAO Form MC 239 is appropriate to use where the case is closed. SCAO Form MC 240 is appropriate to use where the order is revoked.

After a defendant's conviction, the court may incorporate the pretrial release conditions into orders of probation. MCL 771.3(2)(o) authorizes the issuance of probation orders with "conditions reasonably necessary for the protection of 1 or more named persons." Probation orders containing such conditions are entered into the LEIN system. MCL 771.3(5). Violation of a probation order subjects the offender to warrantless arrest under MCL 764.15(1)(g). Some courts give a copy of the probation order to the protected individual to show to police officers in the event of a violation. See Section 9.5(E) for more on probation.

5.9 Notice to Victim Regarding Arrest and Pretrial Release

Under the Crime Victim's Rights Act, the law enforcement agency investigating the offense must provide the victim, in writing, with the opportunity to *request notice* of the defendant's (or juvenile's) arrest, subsequent release, or both. See MCL 780.753 (felonies), MCL 780.813(1) (misdemeanors), and MCL 780.782 (juvenile offenders). Upon such request, MCL 780.755(1) (felonies) requires the law enforcement agency to "promptly provide" this and other information, as follows:

> "Not later than 24 hours after the arraignment of the defendant for a crime, the law enforcement agency having responsibility for investigating the crime shall give to the victim notice of the

> availability of pretrial release for the defendant, the telephone number of the sheriff or juvenile facility, and notice that the victim may contact the sheriff or juvenile facility to determine whether the defendant has been released from custody. The law enforcement agency having responsibility for investigating the crime shall promptly notify the victim of the arrest or pretrial release of the defendant, or both, if the victim requests or has requested that information. If the defendant is released from custody by the sheriff or juvenile facility, the sheriff or juvenile facility shall notify the law enforcement agency having responsibility for investigating the crime."

A substantially similar provision exists for misdemeanors, except that the time requirement for misdemeanors is 72 hours. MCL 780.815(1) (misdemeanors).

A substantially similar provision also exists in cases involving juvenile offenders, except that the time requirement is 48 hours (after the juvenile has been placed in a juvenile facility), and the duty to inform the victim of the juvenile facility's telephone number and to provide notice that the victim may contact the juvenile facility is the responsibility of the prosecutor's office or, pursuant to an agreement, the court. MCL 780.785(1) provides:

> "If the juvenile has been placed in a juvenile facility, not later than 48 hours after the preliminary hearing of that juvenile for a juvenile offense, the prosecuting attorney or, pursuant to an agreement under [MCL 780.798a; see note below], the court shall give to the victim the telephone number of the juvenile facility and notice that the victim may contact the juvenile facility to determine whether the juvenile has been released from custody. The law enforcement agency having responsibility for investigating the crime shall promptly notify the victim of the arrest or pretrial release of the juvenile, or both, if the victim requests or has requested that information. If the juvenile is released from custody by the sheriff or juvenile facility, the sheriff or juvenile facility shall notify the law enforcement agency having responsibility for investigating the crime."
>
> **Note:** MCL 780.798a authorizes the court, in juvenile delinquency cases, to perform the prosecutor's notification duties, but only if the prosecuting attorney agrees in writing to allow the court to perform these duties *and* the court has performed such duties before May 1, 1994.

5.10 Modification of Conditional Release Orders

Because of the potential danger of re-offense in criminal cases involving allegations of sexual assault, modification of conditional release orders should only be granted on the basis of objectively valid reasons. This section addresses requests for modification of release orders that contain conditions for the protection of a named individual brought by the prosecutor, the defendant, or the protected individual. The discussion distinguishes statutory and court rule procedures in felony and misdemeanor cases.

A. Modification of Release Orders in Felony Cases

In felony cases, modification of release orders is generally governed by MCR 6.106(H)(2).* Under this rule, a request to modify a release order may be initiated by the prosecutor, the defendant, or the court on its own motion. The party seeking modification has the burden of going forward. MCR 6.106(H)(2)(c). In modifying a release decision, the court should apply one of the following standards, depending on when the modification is requested:

*This court rule also applies to district court misdemeanor cases, despite its reference to "arraignment on the information," which implies that it is applicable only in felony cases. MCR 6.001(B).

- **Prior to arraignment on the information**, any court before which proceedings against the defendant are pending (i.e., the district court) may modify a prior release decision, based on a finding that there is "a substantial reason for doing so." MCR 6.106(H)(2)(a).

- **At and after the defendant's arraignment on the information**, the court with jurisdiction over the defendant (i.e., the circuit court) may make a de novo determination and modify a prior release decision. MCR 6.106(H)(2)(b).

Other provisions governing modification of release orders in felony cases are as follows:

- MCR 6.004(C) requires the court to initiate modification of bond to allow pretrial release on personal recognizance in felony cases where the defendant has been incarcerated for a period of six months or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode.

- Under the Crime Victim's Rights Act, the prosecuting attorney may move that the bond of a felony defendant be revoked based upon "any credible evidence of acts or threats of physical violence or intimidation by the defendant or at the defendant's direction against the victim or the victim's immediate family . . . ." MCL 780.755(2). A substantially similar provision applies in cases involving juvenile offenders. MCL 780.785(2).

B. Modification of Release Orders in Misdemeanor Cases

In misdemeanor cases, modification of release orders is generally governed by MCL 780.65. Under this statute, the prosecutor or defendant (but not the court) may seek modification of a release order in the court before which the proceeding is pending. MCL 780.65(1).* The defendant shall give the state or local governing unit reasonable notice of his or her request to modify the release conditions. MCL 780.65(2). If the state seeks modification, it shall

*See also MCR 6.106(H)(2)(a), discussed below, which permits a court to seek modification of a release order sua sponte.

give the defendant reasonable notice, except in cases where there has been a breach or threatened breach of any release conditions:

> "Upon verified application by the state or local unit of government stating facts or circumstances constituting a breach or a threatened breach of any of the conditions of the bail bond the court may issue a warrant commanding any peace officer to bring the defendant without unnecessary delay before the court for a hearing on the matters set forth in the application. At the conclusion of the hearing the court may enter an order [increasing or reducing the amount of bail or altering the conditions of the bail bond]." MCL 780.65(4).*

*For release orders issued under MCL 765.6b, the defendant is subject to warrantless arrest upon probable cause to believe that he or she has violated the order. See Section 5.11.

Other provisions governing modification of release orders in misdemeanor cases are as follows:

- MCR 6.004(C) requires the court to initiate the modification of bond to allow pretrial release on personal recognizance in misdemeanor cases where the defendant has been incarcerated for a period of 28 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode.

- Under the Crime Victim's Rights Act, the prosecuting attorney may move that the bond of a defendant charged with a serious misdemeanor be revoked based upon "any credible evidence of acts or threats of physical violence or intimidation by the defendant or at the defendant's direction against the victim or the victim's immediate family." MCL 780.813a.* See also MCL 780.815(2). Serious misdemeanors are defined in MCL 780.811(a) to include assault and battery (including domestic assault), aggravated assault (including aggravated domestic assault), entry without permission, fourth-degree child abuse, accosting and soliciting a child, indecent exposure, operating a vehicle or vessel while under the influence or while impaired (if the violation results in physical injury or death), selling or furnishing liquor to a minor (if the violation results in physical injury or death), leaving the scene of a personal injury accident, discharging a firearm aimed intentionally at a person (with and without injury), and stalking.

*A substantially similar provision applies in cases involving juvenile offenders. MCL 780.785(2).

- Under MCR 6.106(H)(2)(a),* the prosecuting attorney, the defendant, or the court may move that the bond of a misdemeanor defendant be modified based on a finding that there is "a substantial reason for doing so."

*MCR 6.106 applies to district court misdemeanor cases, despite its reference to "arraignment on the information," which implies that it is applicable only in felony cases. MCR 6.001(B).

C. Requests for Modification by the Protected Individual

On occasion, an individual protected by a conditional release order may appear in court to request modification of the order. The court should refer all such requests to the prosecutor. A protected person is not a party to the criminal action against the defendant. Moreover, no statute or court rule grants protected persons (including victims) legal standing to question orders of the trial court in criminal cases.

D. LEIN Entry of Modified Release Order; Notice to Surety

*If the only amendment is to extend the bond's expiration date, a court may use SCAO Form MC 240a.

If a release order issued under MCL 765.6b is modified, the judge or district court magistrate must immediately direct a law enforcement agency within its jurisdiction to enter the modified order into the LEIN system. This notice to the law enforcement agency must be in writing. MCL 765.6b(4). SCAO Form MC 240 can be used to notify the law enforcement agency. If a release order is modified using Form MC 240, it should be clearly marked as "modified" or "amended" to avoid confusion with the original order.* The superseded order can be removed from the LEIN system using SCAO Form MC 239.

Whenever the court modifies its order to impose an additional release condition after the surety has signed the bond, the surety's consent to that condition must be obtained before forfeiture based on violation of the additional condition is permitted. *Kondzer v Wayne County Sheriff*, 219 Mich App 632 (1996).

5.11 Enforcement Proceedings After Warrantless Arrest for an Alleged Violation of a Release Condition

A release order with conditions for the protection of a named person will only be effective if the defendant knows that violation of the order will result in sanctions. Lax enforcement of such orders may actually increase danger by providing the protected person with a false sense of security. Accordingly, strict, swift enforcement procedures are important tools to enhance safety.

*MCL 764.15(1)(g) was amended to include this authority by 2001 PA 212, effective April 1, 2002.

If the court has imposed release conditions for the protection of a named person under MCL 765.6b(1), a peace officer may arrest the defendant without a warrant upon reasonable cause to believe that the defendant is violating or has violated a release condition. MCL 764.15e; and MCL 764.15(1)(g).* (Under MCL 764.9c(3)(c), a peace officer may not issue an appearance ticket for a misdemeanor or ordinance violation to a person who is subject to a condition of bond or other condition of release, until the person meets the requirements of bond or other condition of release.) The warrantless arrest authority conferred in these statutes offers swift, significant protection to the person protected by the release order; MCR 6.106 contains no similar provision for warrantless arrest. **Therefore, in cases involving allegations of sexual assault, it is safer to issue pretrial release orders under MCL 765.6b using SCAO Form MC 240 than under MCR 6.106.**

*MCL 600.2950h was enacted by 2001 PA 206, effective April 1, 2002. MCL 600.2950*l* and MCL 600.2950m were enacted by 2001 PA 197, effective April 1, 2002

> **Note:** Law enforcement officers, prosecutors, and courts may now enforce out-of-state conditional release orders or probation orders that protect a named person and meet the definition of "foreign protection order" under MCL 600.2950h(a). MCL 600.2950*l*(2). A violation of such orders is a 93-day/$500.00 misdemeanor. MCL 600.2950m.*

The following discussion outlines the bond revocation proceedings that follow a warrantless arrest for the alleged violation of a release condition pursuant to MCL 764.15e.

A. Preparation of Complaint

After warrantless arrest for violation of a release condition pursuant to MCL 764.15e, bond revocation proceedings are initiated by a complaint. The arresting officer must prepare the complaint in a format that substantially corresponds to the format contained in MCL 764.15e(2)(a). Proceedings after preparation of the complaint depend on whether the defendant was arrested within the judicial district of the court that issued the order for conditional release.

- If the arrest occurred **within the judicial district** of the court that issued the order for conditional release, the defendant must appear before the issuing court within one business day after the arrest to answer the charge of violating the release conditions. MCL 764.15e(2)(b)(ii). Under MCL 764.15e(2)(b)(i), the arresting officer must immediately provide copies of the complaint as follows:
  - One copy to the defendant;
  - The original and one copy to the issuing court;
  - One copy to the prosecuting attorney for the case; and
  - One copy for the arresting agency.
- If the arrest occurred **outside the judicial district** of the court that issued the order for conditional release, the defendant shall be brought before the district or municipal court in the judicial district in which the violation occurred within one business day following the arrest. That court shall determine conditions of release and promptly transfer the case to the court that issued the conditional release order. The court to which the case is transferred shall notify the prosecuting attorney in writing of the alleged violation. MCL 764.15e(2)(c)(ii). Under MCL 764.15e(2)(c)(i), the arresting officer must immediately provide copies of the complaint as follows:
  - One copy to the defendant;
  - The original and one copy to the district court in the judicial district in which the violation occurred; and
  - One copy for the arresting agency.

B. Availability of Interim Bond

If the arresting agency or officer in charge of the jail determines that it is safe to release the defendant before he or she is brought before the court, the defendant may be released on interim bond of not more than $500 requiring that the defendant appear at the opening of court the next business day. If the defendant is held for more than 24 hours without being brought before the court, the officer in charge of the jail must note in the jail records the reason it was not safe to release the defendant on interim bond. MCL 764.15e(3).*

*See Section 5.2 for further discussion on interim bond.

Note: The interim bond statutes (MCL 780.581 to MCL 780.587) do not apply to misdemeanor domestic assault and battery and domestic aggravated assault and battery offenses. See Section 5.2(B) for discussion of restrictions on interim bond.

C. Hearing Procedures

If a defendant has been arrested without a warrant for an alleged violation of release conditions imposed under MCL 765.6b(1), the warrantless arrest statute requires the court to give priority to cases in which the defendant is in custody or in which the defendant's release would present an unusual risk to the safety of any person. MCL 764.15e(4). The warrantless arrest statute further provides that "[t]he hearing and revocation procedures for cases brought under this section shall be governed by Supreme court [sic] rules." MCL 764.15e(5).

*MCR 6.106 was adopted before the 1993 passage of the warrantless arrest provisions in MCL 764.15e.

MCR 6.106 does not give clear guidance on hearing procedures after a warrantless arrest for alleged violation of a pretrial release condition. This court rule states that the court may issue a warrant for the defendant's arrest if he or she has violated a release condition,* and contains no requirement for a hearing whatsoever. MCR 6.106(I)(2) provides:

> "(2) If the defendant has failed to comply with the conditions of release, the court may issue a warrant for the arrest of the defendant and enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited.
>
> "(a) The court must mail notice of any revocation order immediately to the defendant at the defendant's last known address and, if forfeiture of bond has been ordered, to anyone who posted bond."

Although MCR 6.106(I)(2) is silent on the issue of a revocation hearing, the statutes governing bail for traffic or misdemeanor offenses require the court to hold a hearing in cases where the defendant has been arrested on a warrant issued after a breach or threatened breach of any release conditions:

> "Upon verified application by the state or local unit of government stating facts or circumstances constituting a breach or a threatened breach of any of the conditions of the bail bond the court may issue a warrant commanding any peace officer to bring the defendant without unnecessary delay before the court *for a hearing* on the matters set forth in the application. At the conclusion of the hearing the court may enter an order [increasing or reducing the amount of bail or altering the conditions of the bail bond]." MCL 780.65(4). [Emphasis added.]

The federal due process requirements for revoking bond were addressed in *Atkins v People*, 488 F Supp 402 (ED Mich, 1980), aff'd in pertinent part 644 F2d 543 (CA 6, 1981). In *Atkins*, a habeas corpus proceeding arising from the petitioner's prosecution for murder in Detroit Recorder's Court, the petitioner asserted that the Michigan Court of Appeals violated his due process rights when it summarily cancelled his bond set by the Recorder's Court without reviewing the transcript of proceedings in the Recorder's Court or providing

any reasons for its action. The federal courts agreed, holding that the defendant's liberty interest pending trial on criminal charges was "sufficiently urgent that as a matter of due process [bail] cannot be denied without the application of a reasonably clear legal standard and the statement of a rational basis for the denial." *Atkins*, 644 F2d at 549. The Sixth Circuit Court of Appeals further noted that the Michigan Court of Appeals' action rendered meaningful review impossible and violated "basic norms of judicial decisionmaking." *Id*. at 550. It held that "if [defendant's] liberty is to be denied, it must be done pursuant to an adjudicatory procedure that does not violate the standards for due process established by the Fourteenth amendment." *Id.* For a similar holding in a case involving the cancellation of bond for a post-conviction detainee pending appeal of the conviction, see *Puertas v Michigan Dep't of Corrections,* 88 F Supp 2d 775 (ED Mich, 2000).

In light of the protected liberty interests articulated in *Atkins*, and the hearing requirement set forth in MCL 780.65(4), the Advisory Committee for this Benchbook suggests that basic due process requires the court to give defendants an opportunity for a hearing after warrantless arrest for alleged violation of a release condition imposed under MCL 765.6b. The Committee further suggests hearing procedures analogous to those described for bail custody hearings in MCR 6.106(G). Under this court rule, the court may conduct custody hearings at the defendant's request, as follows:

> "(2)(a) At the custody hearing, the defendant is entitled to be present and to be represented by a lawyer, and the defendant and the prosecutor are entitled to present witnesses and evidence, to proffer information, and to cross-examine each other's witnesses.
>
> "(b) The rules of evidence, except those pertaining to privilege, are not applicable. . . . A verbatim record of the hearing must be made."

Although no rules specifically address the required burden of proof for hearings involving alleged conditional release violations, in cases involving the modification of release decisions "[t]he party seeking modification of a release decision has the burden of going forward." MCR 6.106(H)(2)(c). Similarly, no rules specifically address the required standard of proof at such hearings, although the "preponderance of evidence" standard applies to evidentiary hearings. *Bourjaily v United States*, 483 US 171, 175-176 (1987).*

*The required burden of proof for constitutional questions of admissibility varies. For more information on this issue, see Monograph 6: *Pretrial Motions—Revised Edition* (MJI, 2001).

Appellate review of the court's decision revoking bond is governed by MCR 6.106(H)(1):

> "A party seeking review of a release decision may file a motion in the court having appellate jurisdiction over the court that made the release decision. There is no fee for filing the motion. The reviewing court may not stay, vacate, modify, or reverse the release decision except on finding an abuse of discretion."

In addition to revocation procedures under the court rule, MCL 765.6b(1) anticipates that contempt proceedings may be brought against the defendant.* This statute requires the court to inform defendants on the record of the following sanctions at the time the court issues a conditional release order:

> "[I]f the defendant violates a condition of release, he or she . . . may have his or her bail forfeited or revoked and new conditions of release imposed, *in addition to any other penalties that may be imposed if the defendant is found in contempt of court*." [Emphasis added.]

*For a discussion of contempt proceedings generally, see Lovik, *Domestic Violence: A Guide to Civil & Criminal Proceedings* (MJI, 2d ed, 2001), Sections 8.3-8.4.

The United States Supreme Court has held that double jeopardy protections attach to non-summary criminal contempt proceedings. In *United States v Dixon*, 509 US 688 (1993), a defendant accused of second-degree murder was granted pretrial release on the condition that he not commit any criminal offense. After his release, the defendant was arrested and indicted for possession of narcotics. Based on the alleged narcotics offense, the court in the murder proceeding found the defendant guilty of criminal contempt for the violation of his release conditions. The defendant then moved to have the narcotics indictment dismissed on double jeopardy grounds. A majority of the U.S. Supreme Court agreed that double jeopardy barred the defendant's prosecution for possession of narcotics. *Id*.

5.12 Enforcement Proceedings Where the Defendant Has Not Been Arrested for the Alleged Violation

If the defendant violates a release condition imposed under MCL 765.6b and is not arrested under the warrantless arrest statutes,* MCR 6.106(I)(2) provides as follows:

> "(2) If the defendant has failed to comply with the conditions of release, the court may issue a warrant for the arrest of the defendant and enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited.
>
> "(a) The court must mail notice of any revocation order immediately to the defendant at the defendant's last known address and, if forfeiture of bond has been ordered, to anyone who posted bond."

*The warrantless arrest statutes are MCL 764.15e and MCL 764.15(1)(g).

Practice under the court rule varies as to whether the bond revocation proceedings are initiated on motion of the prosecutor, or on the court's own motion. In misdemeanor cases, MCL 780.65(4) provides:

> "*Upon verified application by the state or local unit of government* stating facts or circumstances constituting a breach or a threatened breach of any of the conditions of the bail bond the court may issue a warrant commanding any peace officer to bring the defendant without unnecessary delay before the court for a hearing on the matters set forth in the application. At the conclusion of the hearing the court may enter an order [increasing or reducing the amount of bail or altering the conditions of the bail bond]." [Emphasis added.]

This statute makes no provision for court-initiated revocation proceedings in misdemeanor cases. However, MCR 6.106(H)(2) authorizes modification of prior release decisions in both misdemeanor and felony cases on motion of a party or on the court's own initiative.* If the court initiates revocation proceedings on its own motion, the Advisory Committee for this Benchbook suggests that it notify all interested parties, and set the matter for hearing if it is contested.

*Despite language clearly implying applicability to only felonies, MCR 6.106 also applies to misdemeanors. MCR 6.001(B).

MCR 6.106(I)(2) is silent as to the hearing requirements after a defendant's arrest pursuant to a warrant for an alleged violation of a release condition. A hearing is required in misdemeanor cases under MCL 780.65(4); however, this statute does not set forth specific hearing procedures. In light of the liberty interests at stake, the Advisory Committee suggests that courts follow procedures analogous to those described for bail custody hearings in MCR 6.106(G). Under this court rule, the court may conduct custody hearings at the defendant's request. Such hearings must follow the following procedures:

> "(2)(a) At the custody hearing, the defendant is entitled to be present and to be represented by a lawyer, and the defendant and the prosecutor are entitled to present witnesses and evidence, to proffer information, and to cross-examine each other's witnesses.
>
> "(b) The rules of evidence, except those pertaining to privilege, are not applicable. . . . A verbatim record of the hearing must be made."

See *Atkins v People*, 488 F Supp 402 (ED Mich, 1980), aff'd in pertinent part 644 F2d 543 (CA 6, 1981), for a discussion of the federal due process requirements for revoking bond. This case is discussed in Section 5.11(C).

Appellate review of the court's decision revoking bond is governed by MCR 6.106(H)(1):

> "(1) A party seeking review of a release decision may file a motion in the court having appellate jurisdiction over the court that made the release decision. There is no fee for filing the motion. The reviewing court may not stay, vacate, modify, or reverse the release decision except on finding an abuse of discretion."

In addition to revocation procedures under the court rule, MCL 765.6b(1) anticipates that contempt proceedings may be brought against the defendant.* This statute requires the court to inform defendants of the following sanctions at the time the court issues a conditional release order:

*For a discussion of contempt proceedings generally, see Lovik, *Domestic Violence: A Guide to Civil & Criminal Proceedings* (MJI, 2d ed, 2001), Sections 8.3-8.4.

> "[I]f the defendant violates a condition of release, he or she . . . may have his or her bail forfeited or revoked and new conditions of release imposed, *in addition to any other penalties that may be imposed if the defendant is found in contempt of court*." [Emphasis added.]

The United States Supreme Court has held that double jeopardy protections attach to non-summary criminal contempt proceedings. See *United States v Dixon*, 509 US 688 (1993), discussed in Section 5.11(C).

5.13 Forfeiture of Bond Where Defendant Violates a Release Condition

MCR 6.106(I)(2) contains the procedural requirements for bond forfeiture:

- If the court revokes its release order and declares the surety bond forfeited, it must mail notice of the revocation order immediately to the defendant at his or her last known address, and to anyone who posted bond. MCR 6.106(I)(2)(a).

- "If the defendant does not appear and surrender to the court within 28 days after the revocation date or does not within the period satisfy the court that there was compliance with the conditions of release or that compliance was impossible through no fault of the defendant, the court may continue the revocation order and enter judgment for the state or local unit of government against the defendant and anyone who posted bond for the entire amount of the bond and costs of the court proceedings." MCR 6.106(I)(2)(b).

Forfeiture of a bond in the event the defendant violates a condition of release imposed under MCL 765.6b(1) is permitted only if the surety has notice of the condition and has given consent to it. In *Kondzer v Wayne County Sheriff*, 219 Mich App 632 (1996), the surety obtained a $50,000.00 bail bond for the pretrial release of a criminal defendant charged with criminal sexual conduct. When the district court bound over defendant to circuit court for trial, it added a condition of release that defendant have no contact with the complaining witness. The surety was not present when the court added the additional condition, and did not consent to it. Thereafter, the defendant raped the complaining witness in violation of the protective condition. The Court of Appeals held that forfeiture of the bond was improper in this case because the surety did not consent to the additional protective condition on defendant's release. A surety bond is a contract governed by the common law rule that the parties' liabilities under a contract are strictly limited by its terms, which cannot be changed without the parties' consent. This common law rule was not changed by MCL 765.6b(1).

5.14 Discovery in Sexual Assault Cases

This section discusses applicable discovery rules for both the prosecution and defense in sexual assault cases.

A. Applicable Discovery Rules in Felony and Misdemeanor Cases

In felony cases, discovery is governed by MCR 6.201. In misdemeanor cases, discovery is within the discretion of the court. See *People v Laws*, 218 Mich App 447, 454 (1996); and Gillespie, Michigan Criminal Law & Procedure (2d ed, 2002 Practice Deskbook), § 7:01, p 2. The court rule governing felony discovery, MCR 6.201, is inapplicable in misdemeanor cases. See Administrative Order No. 1999-3, which clarified the scope of applicability

of MCR 6.201 and limited its application to felony cases. Discovery in juvenile delinquency proceedings is governed by MCR 5.922(A).

B. Discovery Rights

1. Generally

Under MCR 6.201(B)(1)-(5), the prosecutor must, upon request, provide the defendant with the following:

- Any exculpatory information or evidence known to the prosecutor;
- Any police report concerning the case, except those portions concerning a continuing investigation;
- Any written or recorded statements by a defendant, codefendant, or accomplice, even if the person is not a prospective witness at trial;
- Any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and,
- Any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

Discovery applies to all parties in felony cases. Under MCR 6.201(A)(1)-(6), a party must disclose to other parties, upon request, any of the following:

- The names and addresses of all lay and expert witnesses to be called at trial;
- Any written or recorded statement by a lay witness to be called at trial, except that a defendant is not required to provide the defendant's own statement;
- Any report produced by or for an expert witness to be called at trial;
- Any criminal record a party intends to use to impeach a witness at trial;
- Any document, photograph, or other paper the party intends to introduce at trial; and
- A description of, and an opportunity to inspect, any tangible evidence a party intends to introduce at trial. For good cause, a party may be given the opportunity to test, without destruction, tangible physical evidence.

Additionally, a defendant has a due process right to obtain evidence in the prosecutor's possession if it is favorable to the defendant and material to guilt or punishment. *Brady v Maryland*, 373 US 83, 87 (1963).* On the other hand, a prosecutor's privilege against disclosing work product is broad, and such work product is absolutely privileged from disclosure under Michigan's Freedom of Information Act (MFOIA). *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 641 (1998).

*See Section 5.14(D) for more information on due process rights under *Brady v Maryland.*

Oral statements not reduced to writing are not discoverable as "written or recorded statements." *People v Finley*, 161 Mich App 1, 9-10 (1987). Moreover, a defendant is not required to turn over his or her own written or recorded statement to the prosecutor. MCR 6.201(A)(2). In *People v Lynn*, 91 Mich App 117, 126-127 (1979), the Court of Appeals held that a discovery order containing the language "any and all witnesses" should be construed as referring to statements made by persons *other than* the defendant, especially when the order contains other specific references to defendant. The Court held that it should be presumed that a defendant knows what statements he or she has previously made. The Court held that, as a result, nondisclosure of the defendant's statement does not preclude its later use as impeachment evidence.

In *People v Holtzman*, 234 Mich App 166, 168 (1999), the Court of Appeals held that a prosecuting attorney's notes from an interview with a witness who will be called at trial do not constitute a "statement" of the witness that must be disclosed upon request under MCR 6.201(A)(2). The Court based its holding on two grounds: an attorney's notes do not meet the definition of "statement" applicable to discovery requests under MCR 6.201(A)(2), and allowing discovery of such notes would compromise the "work-product privilege." *Holtzman, supra* at 168-170. In defining "statement" under MCR 2.302(B)(3)(c), the Court held that, despite the rule's express limitation that the statements be made by the person seeking discovery, the definition can be applied to any statement made by a witness the party intends to call at trial. *Holtzman*, *supra* at 176. Thus, for purposes of MCR 6.201(A)(2), a "statement" is either of the following:

> "(i) a written statement signed or otherwise adopted or approved by the person making it; or
>
> "(ii) a stenographic, mechanical, electrical, or other recording, or a transcription of it, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded." *Holtzman, supra* at 176.

To determine whether a witness has "adopted or approved" a statement, there must be a finding of "unambiguous and specific approval" by the witness. *Id.* at 179-180, quoting *Goldberg v United States*, 425 US 94, 115-116 (1976). A witness who reviews the prosecutor's notes for inaccuracies or in anticipation of the witness's testimony at trial does not "adopt or approve" the notes as a statement of the witness. *Holtzman, supra* at 180. Applying these rules, the Court in *Holtzman* concluded that factual information contained in the prosecutor's notes did not constitute witness "statements" for purposes of MCR 6.201(A)(2). *Holtzman, supra* at 180. The Court in *Holtzman* also concluded that allowing discovery of an attorney's notes from an interview with a witness would compromise the "work-product privilege" because written interview notes often evidence the attorney's mental processes. *Id.* at 184-185.

2. Discovery Rights Before Preliminary Examination

The felony discovery rule in MCR 6.201 applies to proceedings in both district and circuit court. *People v Pruitt*, 229 Mich App 82, 87 (1998). A district court has the authority to order discovery before the preliminary examination. In *In re Bay Prosecutor*, 109 Mich App 476, 486 (1981), the Court of Appeals, on the basis that "[f]undamental fairness requires full disclosure," reinstated the district court's dismissal of a negligent homicide charge because the prosecutor refused to provide *copies* of police reports to defendant before the preliminary examination. See also *Harbor Springs v McNabb*, 150 Mich App 583, 584-586 (1986) ("fundamental fairness" requires providing *copies* of police reports in misdemeanor reckless driving case).

A district court has jurisdiction to conduct an in camera review before the preliminary examination to determine whether evidence sought is discoverable. In *People v Laws*, 218 Mich App 447, 452-453 (1996), the Court of Appeals held that the district court's actions in conducting an in camera review of police reports concerning defendant's activities as an informant on other cases did not exceed its authority or jurisdiction, especially since the discovery was sought to support allegations of due process violations, such as prosecutorial vindictiveness and unreasonable prearrest delay.

C. Limitations on Discovery

1. Depositions and Pretrial Witness Interviews

MCR 6.001(D) prohibits taking depositions in criminal cases for discovery purposes. However, a deposition may be taken in criminal cases under some circumstances. MCL 768.26 provides:

> "Testimony . . . taken by deposition at the instance of the defendant, may be used by the prosecution whenever the witness giving such testimony can not, for any reason, be produced at the trial, or whenever the witness has, since giving such testimony become insane or otherwise mentally incapacitated to testify."

MCL 767.79 also provides:

> "After an indictment shall be found against any defendant, he may have witnesses examined in his behalf conditionally on the order of a judge of the court in which the indictment is pending, in the same cases upon the like notice to the prosecuting attorney, and *with like effect in all respects as in civil suits*." [Emphasis added.]

See also *People v Tomko*, 202 Mich App 673, 679-680 (1993) ("[N]othing . . . precludes the taking of a deposition *de bene esse* in a criminal case under some circumstances," citing MCL 768.26 and MCL 767.79).

Despite these discovery limitations regarding depositions, a witness may allow interviews by a party's counsel. It is improper for the prosecuting attorney to advise a witness to refuse defense counsel's request for an interview. See *In re Bay Prosecutor*, 109 Mich App 476, 480, 482-84 (1981), where the prosecutor interrupted the defense counsel's interview of two police officers in the courtroom, during a break, telling them they did not have to talk to the defense counsel. The Court of Appeals held:

> "[I]t is obvious from the circumstances that the prosecutor intended to obstruct the defense attorney from interviewing the police officers. The prosecutor's unsolicited advice to the witnesses clearly indicated that he did not want them to talk to the defense attorney. In our opinion the prosecutor deliberately interfered and did so in violation of his duty to secure justice." *Id*. at 484.

Compare, however, *People v Russell*, 47 Mich App 320, 321-323 (1973), in which the Court of Appeals found no manifest injustice or prejudice to the defendant where the prosecutor advised the victim against talking to the defense, and where the defense made no effort to secure an interview with the victim before trial, and where it did not object at trial.

In Ethics Opinion RI-302 (October 20, 1997),* the following verbatim findings were made in response to a criminal defense attorney's questions concerning the permissibility and scope of ex parte contact with a complaining witness in a criminal case:

- It is not professional misconduct for a criminal defense lawyer to communicate ex parte with a complaining witness without notice to or consent of the prosecutor.
- In any contact by a criminal defense attorney with a complaining witness, the lawyer must make it clear that the lawyer represents the defendant in the criminal case, and the lawyer must not use any deception, give any advice, request the witness to testify falsely or to refrain from giving information to the prosecutor or offer any inducement that is prohibited by law.
- It is not professional misconduct for a criminal defense lawyer to inquire whether the complaining witness wishes to have the prosecution of the case continue or to request that the complaining witness ask the prosecutor to dismiss the charges.
- It is professional misconduct for a prosecutor to request or to advise a complaining witness to refrain from talking with the defendant or defense lawyer, or to urge a law enforcement officer to make, or to knowingly acquiesce in a law enforcement officer making such a request or giving such advice.

*This opinion may be accessed at http://www.michbar.org/opinions/ethics/numbered_opinions/ri-302.htm (last visited July 25, 2002).

2. Psychiatric Evaluations of Victims and Witnesses

Psychiatric evaluations of witnesses are not included in the lists of matters discoverable by right in either criminal or juvenile delinquency proceedings under MCR 6.201(A) and 5.922(A)(1). However, the trial court has discretion to permit discovery of these matters under *People v Valeck*, 223 Mich App 48, 50 (1997).* In exercising this discretion, a court may consider whether cross-examination will fully protect the defendant's right to present a defense. *People v Borney*, 110 Mich App 490, 495 (1981).

*See also *In re Lemmer*, 191 Mich App 253, 256 (1991) (the attorney for a respondent-parent in a child protective proceeding is not allowed to interview the child pursuant to MCR 5.922(A)(2)).

A court may order psychiatric evaluations of complainants in criminal sexual conduct cases only if there is "a compelling reason" to do so. *People v Payne*, 90 Mich App 713, 723 (1979). The following criminal sexual conduct cases illustrate this stringent standard:

- *People v Freeman (After Remand)*, 406 Mich 514, 516 (1979):

The Michigan Supreme Court held that the trial court abused its discretion by ordering the complainant to undergo a psychiatric examination by a psychiatrist chosen by the defendant. Although it did not identify specific factors to consider, the Supreme Court did conclude that the following assertions made by defendant were "amorphous contentions" and clearly insufficient to warrant a psychiatric examination: that the complainant was "highly nervous" and "mentally retarded"; that the alleged offenses occurred two years before the request and were "uncorroborated"; and that the information to be gained from the examination was necessary to attack the complainant's credibility. The Supreme Court also held that if a court grants an examination, the psychologist or psychiatrist must be selected by the court.

- *People v Davis*, 91 Mich App 434, 441 (1979); and *People v Wells*, 102 Mich App 558, 563 (1980):

In these cases, the Court of Appeals held that defendants' request for a psychiatric profile of the complainant, as bearing on the issue of consent, was an insufficient basis to warrant examination.

- *People v Graham*, 173 Mich App 473, 478-479 (1988):

The Court of Appeals found that the trial court abused its discretion by ordering a psychiatric examination for the four-year-old victim's mother. To support the psychiatric examination request, defendant argued that the mother was an alcoholic, that she had made unsubstantiated prior sexual abuse and rape allegations, including unsubstantiated charges regarding defendant's care and treatment of their child, and that she cohabited with other men, one of whom had the same first name as defendant (and who allegedly sexually assaulted the mother's sister.) On appeal, the Court of Appeals found no "compelling reason" to order a psychiatric examination of the victim's parent, although it did say that, in future cases, a psychiatric examination of a victim's parent might be necessary under certain "extenuating circumstances." *Id*. The Court concluded that, in lieu of a psychiatric examination, defendant could

cross-examine the victim's mother regarding her alcoholism and previous unsubstantiated allegations of sexual abuse. The Court also expressed concern that the psychologist's evaluation might very well invade the province of the trier of fact by allowing an expert witness to render an opinion on the veracity of a witness: "An expert cannot be used as a human lie detector to give a stamp of scientific legitimacy to the truth or falsity of a witness' testimony." *Id*. at 478.

3. Discovery of Privileged or Confidential Information or Evidence

*See Sections 7.14-7.15 for further discussion of privileges.

In Michigan, written or oral communications made in the following relationships are protected by statutory privileges:*

- Husband-wife privilege, MCL 600.2162;
- Physician-patient privilege, MCL 600.2157;
- Psychologist-patient privilege, MCL 333.18237;
- Psychiatrist or psychologist-patient privilege, MCL 330.1750;
- Social worker-client privilege, MCL 333.18513;
- Licensed professional counselor-client privilege, MCL 333.18117;
- Domestic violence and sexual assault counselor-client privilege, MCL 600.2157a; and
- Priest-penitent privilege, MCL 600.2156.

Other records that are confidential include juvenile diversion records, MCL 722.828(1)-(2) and 722.829(1); records of mental health services, MCL 330.1748; records of federal or state drug or alcohol abuse prevention programs, 42 USC 290dd—2(a) and MCL 333.6111; and records of prescriptions, MCL 333.17752.

Notwithstanding these statutory privileges and protections, a defendant may be entitled, in certain circumstances, to information contained within confidential records. In *People v Stanaway*, 446 Mich 643 (1994), the Michigan Supreme Court considered the circumstances under which two defendants charged with criminal sexual conduct could discover records of psychologists, sexual assault counselors, social workers, and juvenile diversion officers who counseled the complainants. The Court held:

> "[W]here a defendant can establish a *reasonable probability that the privileged records are likely to contain material information necessary to his defense,* an in camera review of those records must be conducted to ascertain whether they contain evidence that is reasonably necessary, and therefore essential, to the defense. Only when the trial court finds such evidence, should it be provided to the defendant." *Id*. at 649-650. [Emphasis added.]

The Supreme Court in *Stanaway* made the following determinations:

- The discovery request should not be granted if the record reflects that the party seeking discovery is merely on a "fishing expedition" to see what may turn up. *Id*. at 680.

- A general assertion that privileged records might contain evidence useful for impeachment was insufficient to justify an in-camera inspection by the trial court. *Id*. at 681.

- A defense theory that a past trauma caused a complainant to make false accusations was sufficiently specific to justify an in-camera inspection of the complainant's privileged counseling records. *Id*. at 682-683.

- Suppression of the privilege holder's testimony is the appropriate sanction where the privilege is absolute and the privilege holder will not waive his or her statutory privilege and allow the in-camera inspection after defendant's motion has been granted. *Id*. at 684. Nonabsolute privileges, which do not specify that an express waiver is required, do not require waiver by the privilege holder before an order to produce documents for in-camera inspection is entered. *Id*. at 683 n 47.

Regarding procedures for considering defense requests for privileged records, the Supreme Court in *Stanaway* set forth these guidelines:

- The trial court should supply evidence to defense counsel only after it has conducted the in-camera inspection and determined that the records reveal evidence necessary to the defense. *Id*. at 679.

- The presence of defense counsel at the in-camera inspection is not essential to protect the defendant's constitutional rights and would undermine the privilege unnecessarily. *Id*.

- Where a defendant is precluded by statutory privilege from examining counseling communications, the prosecution should not mention the content of these communications in its argument to the jury; such conduct improperly argues facts not in evidence or vouches for a witness's credibility. *Id*. at 685-687.

The procedures set forth in *Stanaway*, *supra*, are codified in MCR 6.201(C), as follows:

> "(1) Notwithstanding any other provision of this rule, there is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant's right against self-incrimination, except as provided in subrule (2).
>
> "(2) If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in-camera inspection of the records.

> "(a) If the privilege is absolute, and the privilege holder refuses to waive the privilege to permit an in-camera inspection, the trial court shall suppress or strike the privilege holder's testimony.
>
> "(b) If the court is satisfied, following an in-camera inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to defense counsel. If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the trial court shall suppress or strike the privilege holder's testimony.
>
> "(c) Regardless of whether the court determines that the records should be made available to the defense, the court shall make findings sufficient to facilitate meaningful appellate review.
>
> "(d) The court shall seal and preserve the records for review in the event of an appeal
>
> > "(i) by the defendant, on an interlocutory basis or following conviction, if the court determines that the records should not be made available to the defense, or
> >
> > "(ii) by the prosecution, on an interlocutory basis, if the court determines that the records should be made available to the defense.
>
> "(e) Records disclosed under this rule shall remain in the exclusive custody of counsel for the parties, shall be used only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide."
>
> > **Note:** With absolute privileges, MCR 6.201(C) requires the trial court to ask the privilege holder to waive the applicable privilege at two separate stages: (1) before conducting an in-camera inspection, MCR 6.201(C)(2)(a); and (2) before disclosing material evidence to the defense after an in-camera inspection, MCR 6.201(C)(2)(b).

For a discussion of what constitutes "material" evidence under MCR 6.201(C)(2), see *People v Fink*, 456 Mich 449, 459 (1998):

> "[T]he touchstone of materiality . . . is a 'reasonable probability' of a different result. The question is whether, in the absence of the disputed evidence, the defendant received a fair trial, i.e., a trial resulting in a verdict worthy of confidence. The suppressed evidence must be considered collectively, not item by item."

The definition of "materiality" used to establish a discovery violation for nondisclosure of evidence under *Brady v Maryland*, 373 US 83 (1963) is substantially similar. See also *People v Fox (After Remand)*, 232 Mich App 541, 549 (1998), which lists the "materiality" requirement under *Brady* as follows: "[T]hat had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." This "materiality" requirement is satisfied only when the undisclosed evidence "'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *People v Lester*, 232 Mich App 262, 282 (1998), quoting *Kyles v Whitley*, 514 US 419, 435 (1995). Further, a "reasonable probability" means "'a probability

sufficient to undermine confidence in the outcome.'" *Lester*, *supra* at 282, quoting *United States v Bagley*, 473 US 667, 682 (1985).

See also *People v Tessin*, 450 Mich 944 (1995), where the Michigan Supreme Court vacated the Court of Appeals' remanding of the case for an in-camera review of the victim's psychological counseling records, holding that the *Stanaway* decision does not automatically require such a hearing simply because psychological harm is alleged as the "personal injury" element of CSC I. The Court held that for a defendant to be entitled to an in-camera hearing, he or she must first establish a reasonable probability that the records contain information material to the defense.

D. Discovery Violations and Remedies

1. Violations

Although a party may violate a court's discovery order in any number of ways, to establish a due process violation under *Brady v Maryland*, 373 US 83 (1963), a defendant must prove:

> (1) That the state possessed evidence favorable to the defendant;
>
> (2) That the defendant did not possess the evidence and could not have obtained it with the exercise of reasonable diligence;
>
> (3) That the prosecution suppressed the favorable evidence; and,
>
> (4) That had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *People v Fox (After Remand)*, 232 Mich App 541, 549 (1998).

The requirement under subparagraph (4), known as the "materiality" requirement, is satisfied only when the undisclosed evidence "'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *People v Lester*, 232 Mich App 262, 282 (1998), quoting *Kyles v Whitley*, 514 US 419, 435 (1995). Further, as used under subparagraph (4), a "reasonable probability" means "'a probability sufficient to undermine confidence in the outcome.'" *Lester*, *supra* at 282, quoting *United States v Bagley*, 473 US 667, 682 (1985).

In *People v Elston*, 462 Mich 751 (2000), the Michigan Supreme Court found no discovery violation and thus no duty on behalf of the trial court to suppress evidence or to sua sponte grant a continuance where the prosecutor informed the defense on the day of trial that its medical witness would testify to the presence of sperm on the victim. In this CSC I case, the defendant was accused of having anal intercourse with a two-year-old child. Although he changed his story a couple of times, he never admitted to engaging in anal intercourse with the child. An emergency room doctor conducted a "criminal sexual conduct kit," and in his report made the following notations: "wet prep" and "motile sperm." This report was provided to both the prosecutor

and defense counsel, neither of whom paid particular attention to these specific notations. On the day of trial, the doctor told the prosecutor for the first time that he had observed sperm fragments on the victim. The prosecutor immediately informed the defense. Instead of asking for a continuance, or for the wet swab laboratory report or wet swab sample, the defense moved to suppress the doctor's testimony regarding the presence of sperm on the basis of not having pretrial notice. The trial court denied the motion, but the Court of Appeals reversed the trial court, finding that the prosecutor committed discovery violations when it failed to make the wet swab laboratory report and sample immediately available to the defense. The Michigan Supreme Court disagreed, finding that, except on appeal, the defense never argued that the prosecutor erred in provided the wet swab laboratory report and sample. Consequently, the Court found no discovery violations:

> "Apart from the wet swab sample and the wet swab laboratory report, the only other 'evidence of sperm' not disclosed to defendant before trial was [the doctor's] own personal observations. Clearly, this information was outside the scope of discovery. Because [the doctor] did not make notes of his observations, they were not subject to mandatory disclosure under MCR 6.201(A)(3). [The doctor's] personal observations of sperm were not otherwise discoverable because evidence of sperm recovered from the victim was not 'exculpatory' under MCR 6.201(B)(1), or 'favorable to an accused' under *Brady* . . . ." *Id*. at 762-763.

The Court found that because defendant failed to allege or establish a specific discovery violation, or prosecutorial misconduct, the trial court lacked the basis to suppress otherwise admissible evidence. *Id*. at 764. The Court also found that because defendant elected not to ask for a continuance, the trial court was not required *sua sponte* to grant one. *Id*. at 764-765.

In *People v Banks*, 249 Mich App 247 (2002), the Court of Appeals, applying the *Brady* standard for discovery violations, found no abuse of discretion in the trial court's denial of defendant's motion for mistrial, where a police report detailing the victim's statement to the investigating detective was first disclosed to the defense (and prosecution) at trial, after the victim testified. In this armed robbery case, the victim testified at trial that he was able to identify his attackers because they removed their masks; however, during the victim's preliminary examination testimony, he made no mention of this. On appeal, the Court of Appeals found that, under the *Brady* standard, the police report was not "favorable evidence" and that it did not meet the *Brady* requirement of "materiality," which requires that there be a reasonable probability that the result of the proceeding would have been different had the police report been disclosed earlier. *Banks*, *supra* at 253-254. The Court found that discrepancies between the victim's preliminary examination and trial testimony existed despite what was contained in the police report, and that the trial was not rendered fundamentally unfair by the failure to disclose the report earlier. *Id*. at 254.

In *Gonzales v McKune*, 247 F3d 1066 (10th Cir, 2001), vacated on other grounds 279 F3d 922 (10th Cir En Banc, 2002), the United States Court of

Appeals for the Tenth Circuit found no violation of the *Brady* rule where the state failed to disclose information about the lack of sperm in a semen sample recovered on the deceased victim's leg. In *Gonzales*, an attempted rape and murder case, the Court of Appeals found only two of the three required *Brady* violations: (1) that the prosecutor "suppressed" the evidence; and (2) that the suppressed evidence was "favorable" and "exculpatory" to the defense (it was less likely that defendant was the semen donor because he had a normal sperm count and did not have a vasectomy). However, the Court of Appeals concluded that the suppressed evidence was not "material" under *Brady*, since the result of the trial probably would not have been different had the information been disclosed to the defense. The Court of Appeals specifically relied on the other strong evidence of guilt in the case, and on the "equivocal" nature of the suppressed evidence: that the absence of sperm in semen neither proves nor disproves that the donor was a sperm producer; that the quality of a semen sample is degraded by age, heat, moisture (even from moistened swabs), humidity, bacteria, and ultraviolet light; and that even a normal emission of semen will have portions containing very little sperm.

2. Remedies

Fashioning a remedy for noncompliance of a discovery order is within the discretion of the court. *People v Clark*, 164 Mich App 224, 229 (1987). Under MCR 6.201(J), a court has the authority to exclude testimony or evidence or to "order another remedy" for discovery violations. See also *People v Elkhoja*, ___ Mich App ___ (2002) (holding that "[t]he court may impose such sanctions as it deems just" under MCR 2.313(B)). However, exclusion of otherwise admissible evidence is a remedy which should be used only in the most egregious cases. *People v Taylor*, 159 Mich App 468, 487 (1987). The preferred remedy for discovery violations is to grant an adjournment to allow the other party to react to the new information. *People v Burwick*, 450 Mich 281, 298 (1995).

To determine the appropriate remedy for discovery violations, a trial court must balance the following factors: (1) interests of the courts; (2) interests of the public; and (3) interests of the parties in light of the relevant circumstances, including the reasons for noncompliance. *People v Davie (After Remand)*, 225 Mich App 592, 597-598 (1997).